

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 JODY KRISS and
5 MICHAEL CHU'DI EJEKAM,

6 Plaintiffs,

7 v.

10 Civ. 3959 (LGS)

8 BAYROCK GROUP LLC, et al.,

9 Decision

10 Defendants.

11 -----x
12 New York, N.Y.
13 May 31, 2016
14 11:50 a.m.

15 Before:

16 HON. LORNA G. SCHOFIELD

17 District Judge

18 APPEARANCES

19 SATTERLEE STEPHENS BURKE & BURKE LLP
20 Attorneys for BayRock defendants
21 BY: CHARLES KEELEY
22 MARK A. FOWLER
23 WALTER A. SAURACK

24 MOSES & SINGER LLP
25 Attorneys for Defendant Satter
26 BY: ROBERT S. WOLF
27 ROBERT B. MCFARLANE

28 BEYS LISTON MOBARGHA & BERLAND
29 Attorneys for Defendant Satter
30 BY: MICHAEL P. BEYS

APPEARANCES

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Attorneys for Defendants Salomon, Weinreich, and Salomon & Co.

BY: RONALD E. JOSEPH

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BLANK ROME LLP

Attorneys for Movant Oberlander

BY: SIMON J.K. MILLER (tel.)

LEVINE SULLIVAN KOCH & SCHULZ LLP

Attorneys for Associated Press and Telegraph Media Group

BY: KATHERINE M. BOLGER

Also Present:

FREDERICE OBERLANDER

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

1 (Case called)

2 THE COURT: Good morning.

3 MR. OBERLANDER: Your Honor, my name is Frederick
4 Oberlander on behalf of clients for whom I have a motion just
5 briefly sub judice, who I wish to be for now identified as Jane
6 Does 1, 2, and 3.

7 THE COURT: Good morning. You may be seated. We are
8 here for a conference on two issues. One is the issue
9 resulting from an order to show cause why Mr. Oberlander and
10 Mr. Lerner should not be sanctioned in connection with their
11 conduct in the three cases before me. The other issue regards
12 the unsealing of the original complaint in this action.

13 I don't want to hear oral argument. I have read all
14 of your papers. They were heavy over the Memorial Day weekend
15 but gave me something interesting to read, so thank you very
16 much.

17 I do have a few questions though. Let me ask my
18 questions before I rule. The first question is for BayRock's
19 counsel. Somebody from the Satterlee Stephens firm will be
20 speaking.

21 MR. SAURACK: Your Honor, there are two things I would
22 note. One is Mr. Vodicka I believe told me he would appear by
23 telephone. I don't know if that access is in place right now.

24 THE COURT: It is possible for him to call, but I
25 haven't received word that he did call in.

1 MR. SAURACK: It's okay, your Honor.

2 MR. OBERLANDER: Your Honor, I'm sorry. I don't mean
3 to interrupt. I am not a party or counsel any longer in the
4 underlying action.

5 THE COURT: I'm having a little trouble hearing you.

6 MR. OBERLANDER: I am not a party or counsel in the
7 underlying plenary action. As to the sanctions motion, I'm
8 obviously a participant and a respondent, but I'm represented
9 in that.

10 If you will forgive me, there is nothing on the docket
11 that I saw that indicates that we are being brought up to date.
12 Moreover, it would mean that Blank Rome, if you forgive the
13 phrase, badly screwed the pooch by not showing up today and
14 missing a calendar call on this.

15 I'm asking the Court: Is there some possibility that
16 the Court simply failed to docket this? This is news to me. I
17 was speaking with them over the weekend on related matters. I
18 can't believe they simply wouldn't show up. They are
19 representing me.

20 If you are going to do anything on that motion, I'm
21 going to request that you stay it until we can straighten out
22 exactly how -- what am I going to say? I have no business
23 representing myself, and there is nothing on any docket that
24 says that is being brought up.

25 THE COURT: I'm not sure if that is true. I wonder if

1 we can get somebody from Blank Rome on the phone.

2 MR. OBERLANDER: If you will forgive me, the Court
3 will note that nobody filed any notices to withdraw or
4 substitute, so they are representing me.

5 THE COURT: I understand, and I have read their
6 papers.

7 MR. OBERLANDER: It's not that. All I saw was a
8 series of four postponement dates on the proceeding based on
9 requests to wait for Judge Kogan. There is nothing that there
10 says that is being brought up. I have no reason to dissemble.
11 I think you understand.

12 THE COURT: I understand what you are saying. I'm
13 trying to approach this practically. I'm not going to hear
14 argument. I don't think anybody will be prejudiced. I under-
15 stand why you would like to have them here. If we can get them
16 on the phone to avoid everyone having to collect again, that
17 would be the easiest thing to do.

18 MR. OBERLANDER: The issue is, to be clear, I don't
19 want to accidentally waive anything by failing to object, and
20 it is not my business to be doing that.

21 THE COURT: I understand. You can sit down. I
22 promise you won't be prejudiced by the fact that Blank Rome is
23 not here. Let's give this a minute to see if we can resolve
24 that.

25 MR. OBERLANDER: I can give you the direct phone

1 numbers, if that is going to help.

2 THE CLERK: I am going to call him now from the
3 courtroom phone.

4 THE COURT: Who is the he?

5 THE CLERK: Mr. Miller.

6 (Pause)

7 THE CLERK: We are going to continue the conference
8 now.

9 THE COURT: Good morning, Mr. Miller. Sorry to get
10 you on the phone like this, apparently unexpectedly. Mr.
11 Oberlander pointed out that he was not aware that the sanctions
12 issue was on the calendar for today. If that is the case, my
13 apologies. It is not my intention to hear oral argument, so I
14 don't intend to put you on the spot. I have reviewed your
15 papers as well as everyone else's papers on that issue, and I
16 have also of course reviewed the papers on the other issue we
17 are considering today, which is the unsealing issue.

18 I was about to ask counsel for BayRock, Mr. Saurack, a
19 question, and that is: What is the current status of the
20 BayRock entities? Are any of them still doing business?

21 MR. SAURACK: They are not doing business.

22 THE COURT: Given that, what kind of privacy interest
23 do they have in the so-called BayRock documents that are not
24 privileged and don't relate to the criminal action but that we
25 might call proprietary?

1 MR. SAURACK: I think it is not just BayRock. The
2 company is still operative; it is still not just developing
3 properties.

4 THE COURT: Pick the mic up and talk into it.

5 MR. SAURACK: The company is not operating now, but it
6 could develop further properties in the future. There are some
7 proprietary aspects of those documents insofar as how they
8 structure a deal and insofar as who their business partners
9 were and those types of items. In essence, what we are care
10 about most are the privileged documents, your Honor, and also
11 the documents taken from the company relating to Mr. Satter.

12 THE COURT: I understand. The next question I had was
13 in the BayRock's papers I got a description of the inadvertent
14 filing of the original complaint in Israel. If I could ask you
15 to tell me what you know about that. Then I will ask counsel
16 for Mr. Satter, although I suspect that the relevant counsel
17 for Mr. Satter is in Israel but not here.

1 I do know Mr. Oberlander is counsel for the party on
2 the other side over in Israel. I leave it to counsel for
3 Satter to give you details concerning that. We are very
4 concerned about how it went from the clerk's office, where you
5 can't just walk in and take it and copy it, to the Internet, to
6 the AP. That is the concern we have.

7 THE COURT: Let me hear from Mr. Satter's counsel, Mr.
8 Wolf.

9 MR. WOLF: Yes, your Honor. Last year, last November,
10 Mr. Satter's counsel in Israel filed papers in court indicating
11 that the --

12 THE COURT: This was a propos of an action against?

13 MR. SAURACK: This was an action that Mr. Satter
14 commenced against Irvin Tausky, who was one of the Gottdiener
15 plaintiffs that this Court dismissed the complaint and the
16 Second Circuit affirmed this Court's dismissal of that
17 complaint. Mr. Satter then brought an action in Israel against
18 Irvin Tausky, who resides there.

19 THE COURT: A complaint?

20 MR. WOLF: Yes. Mr. Satter's counsel in that action
21 inadvertently filed a redacted copy of what is the original
22 complaint in this action.

23 THE COURT: The complaint that is under seal?

24 MR. WOLF: Correct, except that the one that he
25 actually filed in Israel contained additional redactions, not

1 the one that is under seal in this matter, which has no
2 redactions and exhibits. What was filed there without the
3 exhibits that are attached in this one was a copy of that
4 original complaint with redactions on it. It was erroneously
5 filed, filed without the knowledge of Mr. Satter.

6 THE COURT: Let me stop you for a second just so I
7 understand. The original complaint is completely under seal
8 here; there is none of it that is public here.

9 MR. WOLF: Correct.

10 THE COURT: The original complaint was filed with
11 redactions in the Israel action, and you're saying that none of
12 the attachments were filed.

13 MR. WOLF: Correct.

14 THE COURT: I'm not sure that is true.

15 MR. WOLF: When I say none of the attachments, meaning
16 the pre-sentence report and other sealed documents by order of
17 the Eastern District were not attached to that. That document
18 was labeled Exhibit Q in the Israeli filing.

19 THE COURT: Do you know how the Israeli counsel for
20 Mr. Satter got the sealed document?

21 MR. WOLF: They were provided in a file to him by Mr.
22 Satter.

23 THE COURT: By Mr. Satter himself?

24 MR. WOLF: Yes.

25 THE COURT: Or someone on his behalf?

1 MR. WOLF: Or someone on his behalf, for him to review
2 and have a full set of file documents in drafting a complaint.

3 THE COURT: Did someone caution Mr. Satter's counsel
4 about the fact that the document was under seal and not to be
5 disseminated?

6 MR. WOLF: Your Honor, there was a back-and-forth that
7 all documents that would be filed should be cleared through
8 counsel to make sure they weren't under seal. He did not
9 follow up on that, and he subsequently filed. I have an
10 English translation copy of it. We could file it on ECF with
11 the Court, Hebrew and English. He filed in November, when it
12 was brought to his attention, and we only learned about it
13 because The Associated Press contacted us and said, we have a
14 copy of what was filed in Israel and we intend on publishing
15 it.

16 We immediately contacted Israeli counsel, who then
17 immediately filed an urgent ex parte motion to the Israeli
18 court -- this is November 13th of last year -- informing the
19 court, and I'm quoting, "Applicant's counsel," applicant being
20 Felix Satter, "Applicant's counsel, unknown to the applicant
21 himself, inadvertently attached confidential and sealed
22 documents to the statement of claim and now requests the court
23 to issue an order sealing the file from public inspection."
24 That was filed last November, before there was any
25 dissemination of the redacted original complaint in this

1 action. That application was ultimately denied by the Israeli
2 court.

3 I point that out, one, in response to your Honor's
4 question. Two, there is no question that the only way that
5 redacted complaint made its way to the Associated Press was
6 through Tausky's counsel, Frederick Oberlander

7 THE COURT: First of all, we don't point fingers in
8 this courtroom. Second, there is also no question that the
9 complaint made its way to Israeli counsel from Mr. Satter and
10 Mr. Satter's counsel.

11 MR. WOLF: No question.

12 THE COURT: The facts are what the facts are. Let's
13 continue with the facts. What happened as far as the
14 publication of the complaint by The Associated Press? When did
15 that happen?

16 MR. WOLF: That happened in December of last year.
17 Before The Associated Press published that, they were notified,
18 by first myself and then counsel for BayRock before they did
19 it, that that complaint, even in redacted form, was subject to
20 a sealing order in this case, and that sealing order goes back
21 to Judge Buchwald.

22 THE COURT: Had the Israeli court already denied the
23 application to seal at that point?

24 MR. WOLF: I believe it had, your Honor, yes. It is
25 still on appeal now to the Israeli supreme court. But yes.

1 THE COURT: The Associated Press, as I understand it,
2 published it, published a link to the complaint with an online
3 article. Is that right?

4 MR. WOLF: Yes, a link to the complaint with the
5 redactions in it. I say that to emphasize that --

6 THE COURT: There is redacted material in it, I
7 understand.

8 MR. WOLF: Yes. The reference in the papers here that
9 the original complaint should be unsealed, and that's already
10 public, that's not true.

14 MR. WOLF: Your Honor, correct, and there were no
15 attachments that were filed, nor do I believe there were any
16 attachments in the Associated Press article or link. The only
17 link is the original complaint with those redactions.

18 THE COURT: How long was that link live, do you know?

19 MR. WOLF: I don't know, your Honor.

20 || MR. OBERLANDER: It still is.

21 MR. WOLF: I believe it is still live.

22 MR. OBERLANDER: I don't mean to interrupt.

25 MR. OBERLANDER: I'm sorry if this sounds stupid. We

1 are having a hearing and discussing it, obviously.

2 THE COURT: You may sit and get closer to the mic.

3 MR. OBERLANDER: If I might just correct the record a
4 bit. The facts are the facts, and I actually have nothing to
5 do with this one. I'm trying to help the Court.

6 THE COURT: I appreciate it.

7 MR. OBERLANDER: I represent and continue to represent
8 certain interests of the Gottdiener family, of which the sole
9 survivor of that generation is Rabbi Tausky in Israel. I
10 currently represent him in a matter sub judice in the United
11 States federal court of claims here. I do not represent him in
12 Israel, nor obviously could I, because I'm not admitted to
13 practice there. He has independent counsel there at a very
14 prominent law firm.

15 What happened -- I'll make this rapid. We are dealing
16 with very serious issues, and I have been accused of doing
17 something that wouldn't be illegal anyway. Nevertheless, if
18 you give me the opportunity to give you a full background.

19 On approximately the 5th of May or the 1st of May,
20 somewhere around the beginning of May, I notified Judge Maas,
21 who asked me --

22 THE COURT: May of what year?

23 MR. OBERLANDER: I beg your pardon. 2015. I notified
24 Judge Maas, who had asked me to state what my clients intended
25 to do about Chris 2, meaning the Gottdiener clients, that I

1 certainly did represent them. I have a multipage engagement
2 letter. But they had recently received in Israel a letter from
3 counsel threatening that if they did not drop all the actions
4 here, a lawsuit would be brought and this is what the lawsuit
5 would say.

6 The Israeli complaint, which is in Hebrew, basically
7 said that Rabbi Tausky criminally masterminded a plot to have
8 Satter killed, to extort law firms, and caused a sham complaint
9 to be filed and refers to the complaint. In any event, I
10 notified Judge Maas, attached all of that, including trans-
11 lations of it. The next thing I knew, the following Monday I
12 got a notice from Israel that the rabbi had been served.

13 What do you know: he is served with a package which
14 includes the redacted complaint. If I may correct my colleague
15 here, there are attachments to it, none anybody cares about.
16 There are attachments that I had in the original complaint that
17 are secular. They are insurance policies and crap like that,
18 if you will forgive me, let me speak freely, but the Satter
19 documents are not there.

20 Nevertheless, and I promise this will move quickly, I
21 asked Israeli counsel, I said, is there a protective order or
22 something? He said no. And I said, did they file that
23 complaint? He said yes. I said, is it public? He said yes.
24 I said, how does somebody get access?

25 THE COURT: Can you fast-forward?

1 MR. OBERLANDER: Okay. The point is that it is
2 publicly available to any member of the Israeli press. The way
3 it works is the press get a card like you have for the press
4 box in the room, and the press can walk in, put the card in the
5 terminal, and read it. I have no idea how anybody else can get
6 access to it.

7 THE COURT: Here is my question. How long was it live
8 on the AP website?

14 MS. BOLGER: I believe it is live, your Honor.

15 MR. OBERLANDER: I will be done in a minute, but just
16 to follow up on what happened. When the AP contacted us for a
17 comment, they apparently contacted them. But you should know,
18 and I'm telling you -- it's not testimony, I just want to make
19 certain -- I'm telling you they were the eighth press operation
20 to contact us that got it. ABC News got a copy of it. They
21 all have it. So it's not going to accomplish anything.

22 || The end of the story is --

23 THE COURT: I think I have heard enough in answer to
24 my question. It looks like Ms. Bolger may have an addition.

25 MS. BOLGER: I have a quick follow-up. The AP link is

1 still live. In addition, very recently the Telegraph
2 correspondent walked into the courthouse and was able to get a
3 copy of the complaint. So not only is the AP link live, but
4 also the Israeli court is still open and you are still able to
5 get a copy of the complaint.

6 MR. WOLF: Your Honor, may I finished my record?

7 THE COURT: Please finish.

8 MR. WOLF: In court in November, Satter's counsel
9 filed with the court the application and statement that
10 unbeknownst to Satter, he erroneously filed this sealed
11 complaint. That got to The Associated Press, quite obviously,
12 through Mr. Oberlander.

13 I point out, your Honor, the law firm that represents
14 The Associated Press represents Mr. Oberlander. So everybody
15 knows what we are dealing with here. Ms. Bolger's law firm,
16 Levine Sullivan Koch & Schulz, was Mr. Oberlander's counsel in
17 the Second Circuit proceedings that resulted in one of the
18 injunctions that Judge Kogan is tasked by the Second Circuit to
19 enforce. So they are not just here as an objective counsel or
20 party to the public at large; they are married to Mr.

21 **Oberlander.**

22 But let point out one other thing. Before it was ever
23 published by The Associated Press -- that's why I point to Ms.
24 Bolger's letter she feigns ignorance that no one is even
25 claiming that it was filed erroneously -- they were put on

1 notice that it was filed erroneously. Indeed, Tausky, Mr.
2 Oberlander's client, here, not in Israel, opposed the
3 unsealing. He knew when the papers were filed that it was
4 erroneously done by counsel.

5 It is what it is today. But to suggest today that Mr.
6 Satter filed with his blessing so that the whole world could
7 have it is not only false, but making those representations to
8 the Court is deliberately deceptive. For The Associated Press,
9 Oberlander's counsel, to be submitting a letter to the court
10 claiming that --

11 THE COURT: I understand your point. Is that all?

12 MR. WOLF: That's all.

13 THE COURT: Thank you.

14 MR. OBERLANDER: Your Honor --

15 THE COURT: I'm going to rule. Let me make clear on
16 the record what the background is.

17 A gentleman named Brian Vodicka had moved to intervene
18 for the purpose of requesting to unseal the original complaint.
19 My understanding is that Mr. Vodicka is not present. However,
20 he makes a serious request under the circumstances. There were
21 similar requests from the Miami Herald and from The Associated
22 Press, and there was opposition to the unsealing by the BayRock
23 defendants and defendant Felix Satter. I am prepared to rule
24 on the application now.

25 The Court of Appeals for the Second Circuit has set

1 forth a three-part analysis to determine whether a document
2 relating to a lawsuit should be available to the public. That
3 was in Lugosch v. Pyramid Company, 435 F.3d 110, 119-20 (2d
4 Cir. 2006).

5 First, the court is required to determine whether the
6 documents are indeed judicial documents, to which the public
7 has a presumptive right of access, and the documents must be
8 "relevant to the performance of the judicial function and
9 useful in the judicial process."

10 Second, if the court determines the materials a party
11 seeks to have sealed are judicial documents, then the court
12 must determine the weight of the presumption of access. The
13 weight to be given the presumption of access must be governed
14 by the role of the material at issue in the exercise of Article
15 III judicial power and the resultant value of such information
16 to those monitoring the federal courts.

17 Finally, the court must "balance competing
18 considerations against it," citing Lugosch at page 120. "Such
19 countervailing factors include but are not limited to the
20 danger of impairing law enforcement or judicial efficiency and
21 the privacy interests of those resisting disclosure."

22 Basically, to me it seems as though there is a
23 balancing test. On the one hand you balance the importance of
24 judicial documents to the judicial proceeding, and on the other
25 hand you balance the countervailing privacy or other interests.

1 Applying that test here, there is no question that the
2 complaint in a civil action is a judicial document. However,
3 the weight of the presumption of access is weak here because
4 the complaint was never served on some of the defendants, it
5 was never the subject of an answer or motion to dismiss, it was
6 not the subject of discovery, and it was not otherwise the
7 subject of litigation on the merits.

8 Second, regarding the privacy interests of those
9 resisting disclosure, there are no such privacy interests in
10 the portions of the original complaint and its attachments that
11 have already been disclosed. I'm not getting into any finger-
12 pointing here regardless of who was responsible for putting the
13 documents in the hands of the media or even in the hands of Mr.
14 Satter's counsel. The documents have been disclosed.

15 So, in balancing the public's interest to disclosure
16 against the relevant privacy interests, there are no privacy
17 interests for what has been disclosed. I am referring to
18 Gambale v. Deutsche Bank A.G., 377 F.3d 133, 144 (2d Cir.
19 2004), and also In re Application to Unseal, 98 Cr. 1101, 891
20 F.Supp.2d 296, 300 (E.D.N.Y. 2012).

21 What that means is that I'm ordering disclosure and
22 unsealing of the original complaint and its attachments to the
23 extent that they have already been disclosed. I'll get to the
24 rest of it in a moment. Counsel for BayRock and Satter shall
25 confer and shall provide the documents to the Court for filing.

1 Regarding the portions of the complaint that were not
2 disclosed, that were redacted, it seems to me that there are
3 from this long history three categories of information that
4 potentially merit sealing.

5 The first is information relating to Mr. Satter and
6 the criminal action in the Eastern District of New York to the
7 extent that information is still under seal. I know Judge
8 Kogan has recently unsealed additional information. The second
9 category is information reflecting privileged communications.
10 And the third is, if there is still an interest in it,
11 information reflecting trade secret or proprietary business
12 information.

13 I am also ordering the Satter and BayRock defendants
14 to prepare an in camera submission of the original complaint.
15 Instead of redactions, I want highlighting, and I want it
16 highlighted with an accompanying letter. The letter will not
17 be under seal, so draft it accordingly.

18 Identify those redactions, any you don't care about
19 that can be unsealed. There may be some of those, I don't
20 know. Then, if there is anything else that you want to remain
21 sealed, mark it as being in one of those three categories and
22 include a chart or a letter, again publicly filed, explaining
23 the request for the redaction.

24 In other words, as to the criminal action, you can say
25 redaction in paragraph 4, we want this to remain under seal

1 because it is information that is still contained in docket
2 number X in the criminal action, which remains under seal. As
3 to privileged communications, you can say this reflects a
4 communication between X and Y requesting legal advice about Z.

5 As to business information, you should explain the
6 continuing privacy interest. The reason I asked the question
7 at the beginning is to the extent BayRock is in business, not
8 doing this business at the moment or anymore, it seems that the
9 privacy interest is quite weak.

10 Is that all clear? I'll put it in a written order,
11 but want to make sure it is all clear.

12 MR. OBERLANDER: I'm sorry. I just need to clarify
13 something. You're saying that if we would have visualized
14 this, that of the 168 pages --

15 THE COURT: I can't hear you.

16 MR. OBERLANDER: Of the 168 pages, if we visualized it
17 with a bunch of black Magic Markers that he put there, what's
18 not black is going public, what is black they get to submit?

19 THE COURT: They get to submit, and I'll rule whether
20 or not that information should be made public.

21 MR. OBERLANDER: If you would allow me, I'll clock it
22 60 seconds, I could save is a motion to reconsider.

23 THE COURT: That would be great.

24 MR. OBERLANDER: I promise you. With all respect,
25 what you read, and I don't have Lugosch memorized -- I really

1 don't memorize everything in Lexis, just most of it -- but
2 Lugosch has been as to that extent superseded by Bernstein
3 Litowitz, which dates to February. What Bernstein Litowitz
4 says is any civil pleading, especially a complaint, attaches
5 immediately upon filing a First Amendment qualified right of
6 accession.

7 Obviously, it doesn't matter to the extent that you
8 are unsealing. But to the extent of the test as to what else
9 should be under sealed -- I have 30 seconds left -- number one,
10 counsel for Mr. Satter should note his former counsel accepted
11 service under rule 4(b), is it, for waiver of service. That
12 was recorded and every single BayRock defendant did the same
13 thing, and there was a letter that went in. They were served.

14 THE COURT: Not everyone was served.

15 MR. OBERLANDER: No, but they were. Those are the
16 people that are claiming was an inoperable complaint. It
17 certainly was but not as it goes to them. And it doesn't
18 matter whether they were served. All I'm saying, my last 15
19 seconds, is that the test to be applied, the prongs are under
20 the First Amendment, that the presumption of access is there,
21 and the burden is to show (a) there is a compelling interest
22 which (b) is cognizable to the extent that it would override
23 the public right of access and (c) that there are no least
24 restrictive means. I only say that because what you read was
25 the test under the common law, which doesn't apply anymore to

1 complaints.

2 My final point is on Friday, and you may not know
3 about it, with all respect, your colleague in San Diego hearing
4 the Trump cases unsealed certain documents based on an
5 application by The Washington Post. He made the comment that
6 while he was doing it under the common law privilege and
7 clearly would have reached the same result that was following
8 constitutional avoidance, and you may have, nevertheless, under
9 the test for in public interest, it isn't the same in every
10 case. There is a floor. The First Amendment sets a floor.
11 The more important the case is, the higher it goes.

12 He pointed out that anything implicating Donald Trump
13 and fraud has a damn high interest in unsealing. I just wanted
14 to get that on the record. I don't mean to be disputatious.

15 THE COURT: If it will save me a motion to reconsider,
16 I very much appreciate it. And I heard you promise.

17 MR. OBERLANDER: Yes. Thank you.

18 THE COURT: I understand your point. There is both a
19 common law test and a First Amendment test, and they are
20 different. I will evaluate what I receive from the BayRock
21 defendants and from Mr. Satter regarding the redactions.

22 MR. WOLF: Your Honor, if I may. Our biggest concern,
23 and I pointed out that factual history because Judge Kogan took
24 great pains, and I know your Honor has read the transcript --

25 THE COURT: I have.

1 MR. WOLF: -- is to point out the illegal boot-
2 strapping of Mr. Oberlander and Lerner. I submit The
3 Associated Press part of it was just an extension of it: let's
4 get it out there in public while we can and then argue it is
5 futile.

6 THE COURT: I have already ruled. I understand your
7 point and your frustration, and I'm sure you must have been
8 dismayed when you discovered that your client's counsel had
9 done this. But the facts are the facts. It is not a very
10 sympathetic position to be in. You know my ruling, and I will
11 consider your arguments concerning the redactions.

12 MR. WOLF: Thank you very much.

13 THE COURT: Let's turn to the other issue, which is
14 the sanction issue. I'm prepared to rule on that as well, and
15 I don't need to hear any argument.

16 First, let me begin with some observations. I was
17 assigned these cases as I think the third judge in March of
18 2013, which I believe was my first month on the bench. I have
19 had them ever since, although Judge Maas has largely overseen
20 them and Judge Maas has a longer history with them.

21 Based on my having observed the proceedings and
22 participated in them in the last three years, three things seem
23 clear to me: First, that respondents obtained the BayRock
24 documents improperly and used them improperly. When I say
25 respondents, I'm referring to Mr. Oberlander and Mr. Lerner;

1 second, that the respondents used the BayRock documents to
2 commence and then protract litigation, which is was vexatious;
3 and third, that the respondents are likely to continue on this
4 path of vexatious litigation. Let me elaborate.

5 First, that respondents obtained the BayRock documents
6 improperly and used them improperly I think is not news to
7 anyone. I'm not making a finding. This is not a new finding.
8 That fact has been found by other courts before me. The
9 documents included privileged documents, sealed documents from
10 a criminal case, and allegedly proprietary documents.

11 What I care most about as the judge in these
12 proceedings is the improper use of those documents in the
13 filing of the original complaint and the first amended
14 complaint and using or appending some of the so-called BayRock
15 documents to those filings.

16 As to my second complaint, that respondents used the
17 BayRock documents to commence and protract litigation which was
18 vexatious, I don't mean vexatious in the sense that they lack
19 merit. As we all know, we never got to the merits of anything
20 despite years of litigation.

21 But I do mean vexatious in the sense that counsel's
22 desires seem to be, at least in the three cases before me, to
23 foment litigation with the attendant burden on all litigants
24 and the court without any apparent desire to reach the merits.
25 I know Mr. Oberlander differs with that view, but that is the

1 view from my perspective.

2 I would note that a complaint without the offending
3 documents was finally filed in this case and finally served on
4 all of the parties five and a half years after the initial
5 filing, and only after plaintiff was represented by new counsel
6 and current counsel had withdrawn.

7 Third, my observation that respondents are likely to
8 continue on the path of vexatious litigation. First, this is,
9 if nothing else, of interest to me because it seems that there
10 are somehow limitless resources and energy to do so. My
11 observation is based on counsel's conduct in the last three
12 years in the three separate civil lawsuits that I have seen and
13 over which I have presided since March 2013, and also counsel's
14 repeated defiance of court orders with the effect of prolonging
15 the proceedings, their inevitable motions to reconsider every
16 order except perhaps the last one, efforts to reargue issues
17 already decided, and, most telling, the recent filing, as Mr.
18 Oberlander just mentioned, of a \$100 million class action
19 accusing the U.S. government, and specifically prosecutors and
20 the courts, of conspiring to violate their rights.

21 However, having said all that and notwithstanding
22 those observations, I have decided not to impose sanctions
23 against respondents, for two reasons. My concern and domain
24 are the cases before me and counsel's conduct in those cases.
25 The filing of the original complaint gave rise to most of the

1 later collateral litigation that we have been involved in, and
2 that is what has impeded the progress on the merits until very
3 recently.

4 The most significant improprieties related to the
5 disclosure of the information in the complaint, and, as we have
6 just heard and discussed, all of that in some sense is history.
7 The cat is out of the bag, the horse has left the barn, pick
8 whatever metaphor you want, but the information to a large
9 extent in the original complaint is now public.

10 It seems to me that it would be inappropriate to order
11 sanctions relating to my cases in these circumstances.

12 To the extent that respondents' wrongdoing exceeds the
13 bounds of the cases before me, those sanctions should originate
14 elsewhere. I understand that there has been a referral for
15 criminal prosecution to the U.S. Attorney's office for the
16 Eastern District of New York. I also understand the matter has
17 been referred to the grievance committee for at least the
18 Eastern District of New York. Those bodies are certainly
19 empowered to mete out any sanctions that are appropriate.

20 That is my ruling on the sanctions issue. I will have
21 a very brief written order on the first issue just so it is
22 clear what counsel need to do. I don't think an order is
23 necessary on the second.

24 Is there anything else we need to discuss? Thank you.
25 We are adjourned.

1 MR. OBERLANDER: Could you please, before you gavel
2 out, make sure Mr. Miller heard all of that? He isn't saying
3 anything. I can't see his head moving up and down.

4 THE COURT: Mr. Miller, were you able to hear all of
5 that?

6 MR. MILLER: Yes, your Honor, I was. Thank you.

7 THE COURT: Thank you for participating.

8 MR. OBERLANDER: Thank you, your Honor.

9 (Adjourned)

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